

Pages 1 - 46

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
BEFORE THE HONORABLE JEFFREY S. WHITE, JUDGE

KATHLEEN ESPINOSA, ET AL.,)	
)	
Plaintiffs,)	
)	No. C-06-4686 JSW
vs.)	
)	
CITY AND COUNTY OF SAN)	
FRANCISCO, ET AL.,)	
)	San Francisco, California
)	Monday, April 1, 2013
Defendants.)	
_____)	

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

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For Defendants:	City Attorney's Office Fox Plaza 1390 Market Street, Sixth Floor San Francisco, CA 94102-5408
BY:	PETER J. KEITH, ESQ. BLAKE PHILIP LOEBS, ESQ.

REPORTED BY: SARAH GOEKLER, CSR NO. 13446
Computerized Technology By Eclipse

Monday, April 1, 2013

1:33 p.m.

P R O C E E D I N G S

THE CLERK: Calling case number C-06-4686, Kathleen Espinosa, et al. versus City and County of San Francisco, et al.

Counsel, please step forward to the podiums and state your appearances.

MR. NISENBAUM: Good afternoon, Your Honor. Ben Nisenbaum for the plaintiffs.

MR. BURRIS: Good afternoon, Your Honor. John Burris for the plaintiffs.

THE COURT: Good afternoon.

MR. KEITH: Good afternoon, Your Honor. I'm Peter Keith for the defendants, and my colleague, Blake Loeb.

THE COURT: Good afternoon.

All right. Do you need to get settled in, Mr. Loeb?

MR. LOEB: I'm sorry?

THE COURT: Do you need to get settled with your documents?

MR. LOEB: Yeah, just to --

THE COURT: Sure. Go ahead. Whenever you're ready. Please come forward to the lectern and state your -- you stated your appearance, Mr. Loeb? Yes. Okay.

All right. So we're here for the pretrial conference. I wanted to make a couple of comments here which doesn't directly

1 relate to the Espinosa case, which is there's another pretrial
2 conference which is scheduled for the same time in the Young
3 versus Holmes matter. And I intentionally set them for the
4 same time so that some of the discussion that -- what I'm going
5 to have with the Espinosa counsel will apply to the -- in terms
6 of housekeeping rules, will apply to the other case.

7 And if counsel in the Young v. Holmes case, when the Court
8 calls your case, has any questions or wants me to amplify what
9 I said or even repeat it, I'm more than happy to do so. But in
10 the interest of hopefully some efficiency here, I will hope not
11 to repeat some of the housekeeping rules that I'm going to be
12 discussing with the counsel in the first case, the Espinosa
13 case.

14 So the first thing I want to -- as a general matter,
15 there's a number of motions in limine on both sides with
16 respect to expert witnesses, and I'm going to rule on those
17 specifically, but I wanted to make a general ruling, if you
18 will, or a comment, which will govern both sides in questioning
19 their experts under Rule 702 and 703.

20 So I want to -- I'm going to admonish the parties that
21 when they question -- they're questioning their experts, they
22 are not to elicit testimony regarding their opinions on what
23 actually occurred in this case.

24 And by the way -- let me back up a second and say, the
25 Court will not be issuing a further written ruling on these

1 rulings. They'll be in the transcript, and they'll also be
2 part of the minutes of the Court. But I will not -- given
3 resource restraints, I will not have the ability to issue a
4 formal ruling.

5 So again, do not elicit any testimony regarding their
6 opinions on what actually occurred. And giving a little bit
7 more specifics on that, the experts may certainly testify
8 regarding what facts they assumed to be true for purposes of
9 rendering their opinions.

10 For example, Dr. Keram, K-E-R-A-M, cannot testify that the
11 decedent actually pointed an eyeglass case at the officers to
12 simulate a gun, but she can testify that if a -- if the
13 decedent did so, such conduct would be, in her opinion -- if
14 that was her opinion -- of an attempted suicide by cop.

15 Of course, the opposing party in this case, the
16 plaintiffs, are free, under the rules of cross-examination and
17 Rule 702 and 703, to fully cross-examine -- well, and that
18 means in my hypothetical just now about Dr. Keram, the opposing
19 party is free to cross-examine any expert witness by asking
20 hypotheticals based upon facts they assumed and facts they
21 failed to assume that counsel, in good faith, believe should
22 have been taken into account by the expert witnesses.

23 So that's going to be a general rule, and that theme will
24 pervade all of my rulings with respect to the expert witnesses.
25 For those of you who've not been before the Court in trial

1 before and even for those who have, this will be a reminder,
2 the -- this relates to, what is the effect after a ruling in
3 limine? And the effect of a ruling in limine is that it's the
4 order of the Court for the full trial, and the parties are not
5 to engage in self-help if a party, in their view, opens the
6 door -- believes that the other party has opened the door and
7 we're visiting a ruling.

8 In other words, if I say the witness, you know, shall not
9 testify about the color of the light, and the beneficiary of
10 that in limine ruling brings out, through the witness, the
11 color of the light, then the other side may feel, "Okay. All
12 bets are off. I can now fully examine that witness about what
13 was otherwise precluded by the Court." Well, that -- you can't
14 do that. You need to ask the Court to address the Court
15 outside the presence of the jury. It would be in the mode of a
16 motion for reconsideration, based upon a willful and knowing --
17 a willful opening or reckless opening of the door.

18 So just because somebody goes into an area that you feel
19 opens or violates an in limine order that was otherwise in
20 their favor, neither side is free to engage in self-help and
21 say -- conclude that that door was open, because no doors are
22 open until I -- I have the keys. And if I don't open the door,
23 it's not opened.

24 All right. So now what I'm going to do is the parties
25 have briefed extensively their motions in limine, and I'm not

1 going to engage in any argument or even very much discussion.
2 I'm simply going to rule on the in limine motions that were
3 briefed by the parties. And unless otherwise specified -- in
4 most cases will not be specified -- the reasoning is that which
5 is presented by the parties in their -- in the prevailing party
6 in their respective briefs.

7 So I'll start with -- in no particular order, I'll start
8 with the defendants' motions in limine, and then I'll move on
9 to the plaintiffs' motions in limine.

10 So Motion in Limine Number 1, which is the motion to
11 exclude certain evidence concerning Officer Morgado,
12 M-O-R-G-A-D-O, is granted, to the extent that the plaintiffs
13 seek to ask questions about this topic on direct under Federal
14 Rule of Evidence 404(b).

15 Although this was not briefed, I just want to make it
16 clear that nothing in this ruling prevents the plaintiffs from
17 asking questions of Officer Morgado on cross-examination under
18 Federal Rule of Evidence 608(b) as to which there is a
19 good-faith basis. However, the plaintiffs will not be
20 permitted to introduce collateral evidence and will be
21 basically stuck with the answer of the officer.

22 Yes, Mr. Nisenbaum?

23 **MR. NISENBAUM:** Thank you, Your Honor.

24 The question is, can we ask if he was terminated by
25 San Francisco Police Department?

1 **THE COURT:** No. It's excluded. And the adjudication
2 of the board -- police board is not coming in this under 403.
3 I'm excluding it.

4 All right. Motion In Limine Number 2, motion to exclude
5 certain portions of Plaintiffs' police practices expert Lou
6 Reiter, R-E-I-T-E-R, and related evidence is granted in part
7 and denied in part.

8 Mr. Reiter may testify regarding his opinion as to what
9 are proper police practices and whether, based upon assumed
10 facts, the defendants complied with such police practices. But
11 Mr. Reiter may not comment on whether testimony by individual
12 witnesses is contradicted by other evidence. And the
13 plaintiffs may not use -- shall not use Mr. Reiter's testimony
14 to introduce hearsay statements made by others.

15 Additionally, Mr. Reiter may not provide his legal
16 conclusions. He cannot provide an opinion on an ultimate issue
17 of law. For example, he may not and he shall not opine that
18 the defendants did not have probable cause or any exigent
19 circumstances to enter the premises or that any reasonable
20 officer would have known that the initial entry was
21 unconstitutional.

22 And -- so that the parties are honed in on exactly what
23 I'm talking about, they should see Docket 228, Exhibit A, which
24 is Mr. Reiter's report, at paragraph 22. So it's 228 docket
25 number, Exhibit A, paragraph 22 of Mr. Reiter's report.

1 With respect to paragraphs 11 through 20 of Mr. Reiter's
2 reports, the defendants argue that his opinions in these
3 paragraphs are not relevant in this case -- to this case. The
4 plaintiffs, on the other hand, do not explain how they are
5 relevant; therefore, the Court grants the motion to exclude the
6 testimony regarding his opinions in paragraphs 11 through 20.

7 The Court also grants the motion with respect to
8 Mr. Reiter's opinions on the post-incident investigation and
9 the security officers' interviews.

10 The motion is denied with respect to Mr. Reiter's opinions
11 on police practices with respect to responding to persons with
12 diminished capacity. So that takes care of Number 2.

13 Motion In Limine Number 3 -- still on the defendants --
14 the motion to prohibit inappropriate impeachment by omission is
15 denied.

16 The offer of proof by the plaintiffs as to how they wish
17 to impeach the officer with what he didn't -- what they claim
18 he didn't say during an interview, to give his version of what
19 happened is -- that motion is denied.

20 The position taken by the defendants may be the
21 appropriate -- appropriate substance of redirect examination
22 for the officer to explain why he didn't mention certain things
23 that the jury might find to be material. So that motion is
24 denied.

25 Motion In Limine Number 4, to exclude expert testimony by

1 expert witness Robert John- -- or excuse me. Let me go back.
2 Motion to exclude testimony by expert witness Robert Johnson is
3 granted.

4 Number 5 -- Motion In Limine Number 5 to exclude evidence
5 of noneconomic damages by the decedent's estate is denied.

6 Number 6, motion to exclude questions and evidence related
7 to drug use or testing concerning the defendant officers is
8 granted.

9 Motion In Limine Number 7, the motion to exclude any
10 evidence about the officers, quote, other acts, unquote. That
11 motion is granted. But this order does not address the conduct
12 by Officer Morgado in the Hanes incident, which evidence I've
13 already dealt with by addressing Defendants' Motion In Limine
14 Number 1, and the fact that it could be improperly used to
15 impeach him under Rule 608(b).

16 All right. So that takes care of the defendants' motions
17 in limine. Now I'm going to move on to the plaintiffs' motions
18 in limine:

19 So Number 1 -- Plaintiffs' Motion Number 1, the motion to
20 exclude testimony by expert witness Dr. Emily A. Keram,
21 K-E-R-A-M, and her references to suicide by cop, so-called, and
22 prior bad acts of evidence is denied.

23 Number 2 -- Motion In Limine Number 2, which is to exclude
24 or limit testimony of expert witness Alexander Jason is denied.

25 Number 3, motion in limine to exclude the testimony of

1 evidence -- in evidence of alleged prior criminal history,
2 contacts with law enforcement, drug and alcohol use, and mental
3 health and medical history of the decedent and his family
4 members.

5 So I have a question addressed to the defendants since --
6 is what -- what is the prior bad act evidence regarding the
7 decedent's family members that -- well, I guess I should start
8 with Mr. Burris and Mr. Nisenbaum, since you're making the
9 motion: What did you have in mind? Because your motions were
10 very good about carefully identifying what you think is covered
11 by the motions you're making or responding to. In that case,
12 you didn't do such a good job. So what is it that you are
13 concerned about?

14 **MR. NISENBAUM:** Actually, a lot of what Dr. Keram
15 talks about is when Asa was very young, his mother had
16 allegedly abused drugs. Asa had been abused as a child
17 allegedly. There are a number of factors that relate to that
18 when he was very young. There were certain bad acts by the
19 parents, and I think that's what the Court was asking about.

20 **THE COURT:** Right.

21 **MR. NISENBAUM:** That go to their -- kind of how he
22 was raised, if you will.

23 **THE COURT:** All right. And what's your brief
24 response, Mr. Loeb, or --

25 **MR. KEITH:** Mr. Keith.

1 **THE COURT:** Yes.

2 **MR. KEITH:** For the -- with regard to those incidents
3 early in Mr. Sullivan's life, those are one of the bases for
4 Dr. Keram's opinions and for her psychological evaluation of
5 Mr. Sullivan and his potential for suicide by cop. And we
6 certainly don't intend to argue anything along the lines of the
7 sins of the parents be visited on the children. And we think
8 that trying to keep this evidence out would really prejudice
9 our ability to put the bases for Dr. Keram's opinions before
10 the Court.

11 **THE COURT:** I'm going to reserve on that at this
12 moment, but I'll tell you -- just sort of thinking out loud
13 with counsel here -- you know that because of not only that
14 Rule 702 and 703, but the Court's standing order, I try to
15 avoid -- I know otherwise inadmissible evidence can come in
16 through an expert, but then it's up to -- can be considered by
17 an expert, but then it's up to the Court whether the jury gets
18 to hear it. And I want to think about this some more and go
19 back during a break and look at your papers.

20 My inclination is that to the extent Dr. Keram wants to
21 allude generally to the upbringing as an issue, that she might
22 be able to do that. But what I don't want to have go through
23 the back door here is the specifics with respect to the parents
24 and other relatives. I -- my feeling or my rulings are
25 different with respect to Mr. -- the decedent, Mr. Sullivan,

1 for reasons that are articulated in the briefs. But with
2 respect to the family, it's pretty far afield. And also, it
3 does -- notwithstanding Counsel's representation, does tend to
4 visit the sins of the parents on the child.

5 So I'm not ruling on that now, but I'm thinking out loud,
6 that's how I might -- wouldn't say it's Solomon-like but it may
7 be a middle ground. I want to think about that, so there's no
8 ruling on Number 3.

9 **MR. LOEBS:** Your Honor -- would it be helpful if we
10 identified those issues first?

11 **THE COURT:** Yes. Why don't you do that. I don't
12 need to hear argument. Just tell me what they are. They're
13 not issues; they're facts.

14 **MR. LOEBS:** That's what I meant.

15 **THE COURT:** Yes, what are they?

16 **MR. LOEBS:** I thought we could submit it. I can
17 think of some of them, like the suicide attempt by a family
18 member that Dr. Keram testified that it then relates to the way
19 he views suicide.

20 **THE COURT:** If they're -- they're not in your papers?

21 **MR. LOEBS:** I think that one is. I think that
22 several of them are.

23 **THE COURT:** I'll go back and look at your papers. If
24 I need more from you -- because once I do that, I have to give
25 the other side a chance to respond to be fair here. So I'm

1 going to reserve on that at this moment.

2 This may be a kind of a trial-time decision, fact by fact,
3 depending upon -- but I want to hear -- the way I always
4 require this is I want to hear the opinion and the reasons in
5 sort of conclusory form, and then I can determine the need for
6 how I exercise my discretion in the jury hearing of what might
7 otherwise be inappropriate or inadmissible for (b) evidence.
8 But I'm not ruling on that one. I'm just thinking out loud for
9 you.

10 The Motion in Limine Number 4, to exclude the testimony of
11 expert witness Anthony J. Brass. Is this the guy that was a
12 prosecutor here?

13 **MR. BURRIS:** Yes.

14 **THE COURT:** Evidence of the SWAP warrant for
15 decedent's arrest and prior criminal history is denied.

16 Motion In Limine Number 5, to exclude testimony and
17 evidence of the alleged prior bad acts at 2 Garces,
18 G-A-R-C-E-S, by its tenant and guests denied.

19 The issue with respect to standing to object to a Fourth
20 Amendment search is going to be submitted to the jury in this
21 case as an issue of fact, and I think it's proper. This
22 evidence is directly relevant to that issue.

23 6 -- Motion In Limine Number 6, the motion to exclude
24 evidence of the decedent's alleged drug and alcohol use and
25 testimony by expert witness Dr. John Mendelson,

1 M-E-N-D-E-L-S-O-N, and Nicholas P. Lemos, L-E-M-O-S, Ph.D., is
2 denied.

3 Number 7, motion to exclude or limit the testimony of
4 expert witness Kris Mohandie, M-O-H-A-N-D-I-E, and that's
5 K-R-I-S, Ph.D., denied.

6 Motion Number 8, motion to exclude testimony of Francis
7 Woo, W-O-O, and the forensic testing she performed is denied.

8 Motion In Limine Number 9, to bifurcate the issues of
9 liability and damages at trial is denied. I think the evidence
10 is largely overlapping.

11 Number 10 -- Motion In Limine Number 10, to exclude
12 counsel and witnesses from pointing an eyeglass case at the
13 jury to simulate a weapon and from opening and closing the
14 eyeglass case, is granted in part and denied in part.

15 The defendants and their witnesses shall not point
16 anything at the jurors here. Anything. Because I think it
17 evokes emotional response, and it's not appropriate. If you
18 want to point it out into space or have a witness demonstrate
19 in court, you can do it. But I will not allow anything to be
20 pointed at the jury and involve them in the action here.

21 But having said that, without pointing anything at the
22 jurors, if the defendants and their witnesses want to snap an
23 eyeglass case shut to -- for whatever purpose they think is
24 appropriate -- simulating a firearm discharging -- that will be
25 allowed, but do not involve the jury other than hearing it.

1 Now, that takes care of the in limine motions. Are there
2 any -- I've ruled on all of the in limine motions. Are there
3 any questions -- without argument -- clarification, like I --
4 I'm speaking too fast and you didn't get it all, which is
5 perfectly possible. The court reporter will be the first one
6 to tell you that. But other than that, any questions?

7 Mr. Nisenbaum, Mr. Burris?

8 **MR. NISENBAUM:** None. I've already asked them.

9 **THE COURT:** Any from the City and County?

10 **MR. LOEBS:** No, Your Honor.

11 **THE COURT:** So that takes care of the in limine
12 motions on both sides. And I've mentioned to you that the
13 effect of that is none of that stuff is coming in unless a
14 party opens the door, and the Court rules that you've opened
15 the door or there's some change.

16 If a party introduces a theory that was not disclosed to
17 the Court, putting aside the fact I probably wouldn't allow it
18 anyway, but if something happened which might implicate the
19 ruling, you can ask to seek the Court outside the presence of
20 the jury, and I will reconsider, but it will not be lightly.
21 So it really needs to be a fairly substantial act by a party to
22 the prejudice of the other party in -- who's not able to put in
23 that evidence.

24 Now, I want to talk about exhibits and the objections to
25 them. There were way too many of them. And although I try,

1 before trial, as counsel knows, to squeeze out all the air in
2 these cases in terms of not having to involve the jury in
3 having you lay foundations in front of them because it
4 implicates their time as well as your allotted trial time, the
5 number of objections and the exhibit -- and the number of
6 exhibits that were -- as to which there were objections here
7 were way too many for this Court to handle. It was just over
8 the top. And it just seems like the parties are not talking to
9 each other.

10 So given the fact that we have some time before this case
11 is going to be tried, I'm ordering the parties to meet and
12 confer and revise their evidentiary objections and responses
13 thereto, in light of the Court's ruling on the motions in
14 limine. Several of them are going to fall by the wayside
15 because of the Court's rulings in limine.

16 Moreover, if the parties want to obtain a ruling from the
17 Court on any evidentiary objections before trial, they will
18 need to reduce the number of these objections. So to implement
19 that order, by no later than October 21st of 2013, the parties
20 shall submit their revised evidentiary objections and
21 responses, along with copies of the disputed exhibits on which
22 they seek a ruling from the Court prior to trial. I'm
23 expecting this to be a much smaller number because we're right
24 at trial, although it's a few months away, and I really want
25 objections and things that really matter and not ticky-tack

1 foundational objections.

2 And the answer is, if I can't do it, even if the parties
3 have behaved in good faith, which I know they will in a
4 good-faith effort to narrow this down, then you're going to
5 have to make your objections and lay your foundation in front
6 of the jury, and it will come out of your time limits, which
7 are going to be posed in this case.

8 The same is true with respect to your objections to
9 deposition designations. I don't have a problem with the
10 designations; it's the objections that you wanted me to rule
11 on, and I'd like you to take a crack at reducing those. Many
12 of them will be reduced by the motions in limine, I think. And
13 so please limit your objections to substantive disputes rather
14 than foundational objections or any objections that are easily
15 cured by the witness. Otherwise, we'll have to do it in front
16 of the jury, and it'll take time. And please submit your
17 revised objections and responses by October 21st, 2013.

18 Let me ask counsel how you intend to show or display the
19 depositions. Are you going to show video, or are you going to
20 have somebody read them, Mr. Nisenbaum?

21 **MR. NISENBAUM:** Just reading. Reading into evidence.
22 Basically, we'll have a -- someone in the witness box reading
23 the answer, someone here questioning. So question and answer.

24 **THE COURT:** What about from the City and County?

25 **MR. KEITH:** The same, Your Honor. The only witness

1 who was designated. Her deposition was not videotaped.

2 **THE COURT:** All right. Both sides know, being
3 experienced counsel, that jurors hate long readings. Only
4 lawyers love deposition excerpts, and I think my own view is --
5 I think you share this: They are overdone, and they lose their
6 impact, but I'll leave that up to you, but I notice there's a
7 lot of them, and you need to cut them down.

8 All right. The next part of this is -- and specially
9 Plaintiffs' Counsel is -- actually experienced this. Is the
10 way that the Court conducts its voir dire and selects the jury.
11 It will be the same -- for Mr. Nisenbaum and Mr. Burris'
12 benefits or detriment, it's the same way that it was done the
13 last time, but I'll explain that to other counsel in the court.

14 So the Court uses what some call the "modified Arizona
15 method." I actually think it's a really fair way to select a
16 jury. So all of the questions -- or at least initially, will
17 be to the entire array. The jurors will have their numbers.
18 They will be seated in the pews as well as the jury box, and
19 they'll all have equal dignity. In other words, Number 35 will
20 have the same dignity -- if we have 35 members -- as Number 1.
21 It will be fortuitous if 1 is in the jury box as opposed to 35
22 because we don't do 6-packs or 12-packs or any such packs; we
23 treat them all equally.

24 So all the questions initially will be to the array. We
25 start out by having each juror -- each panel member stand up

1 and answer the questions that are on the white board here
2 (indicating), which are sort of name, rank and serial number
3 that would normally be on a questionnaire, but I don't use
4 questionnaires. There have been issues with that.

5 So you'll get a chance to have each one of them speak. If
6 there's issues with the language or hearing or whatever, at
7 least you'll have some inkling if they don't answer any of the
8 specific questions. I don't allow each juror to be questioned
9 individually, even by the Court. The questions are to the
10 array. If we get a positive response, then we'll follow up
11 with every juror until we've learned each response to ground.

12 So after the white board is completed and we've gone
13 around -- and my courtroom deputy will give you a copy of that.

14 **MR. LOEBS:** We were writing it down.

15 **THE COURT:** Yeah, I know you were. And you'll get
16 that, and the jurors will also have that. They'll have it on
17 their screen. They'll have it up there (indicating). And
18 you'll have that as well.

19 And then the Court will then ask the voir dire that has
20 been proposed by the parties and agreed to by the Court. And
21 the Court will address the parties' proposed voir dire at what
22 will be a further pretrial conference in this case. There will
23 be another conference, and I'm going to address your voir dire
24 at that time. But given the time to trial, I'm giving myself a
25 little bit more space here for that.

1 But it'll be -- most of the questions you asked, I think,
2 are -- usually asked in these cases are pretty standard and
3 appropriate and about police practices and activities with or
4 exposure to police or law enforcement or working in that genre.
5 I'm pretty liberal about giving those questions, but we'll get
6 to that.

7 So once we finish -- once the Court finishes asking its
8 questions, the Court will give the parties a brief period of
9 time, one side -- one lawyer per side, to follow up on factual
10 questions that have been raised, and I mean that. This is not
11 an opportunity for you to show what you learned in your trial
12 advocacy course about how to pick a jury, how to persuade them.
13 It's facts. Those of you who are old enough -- probably not
14 many in the court -- remember Sergeant Friday from Dragnet,
15 "Just the facts, ma'am." Well, it's just the facts.

16 If they said something, and you feel it's appropriate to
17 follow up, and I didn't do it or you think it's appropriate for
18 your client to follow up, I will absolutely let you do that.
19 But it's not an opportunity to ask new and different questions
20 or to try to -- what I won't allow is what they do in state
21 court and have the jury talk about how they would deal with
22 hypothetical questions, and, you know -- assuming the law was
23 X, how would they rule. I don't allow that in this court. And
24 I'm more than able to sustain objections if it's inappropriate,
25 but I don't expect that from any of you because you're all

1 experienced here.

2 So then after you've had an opportunity to follow up on
3 the Court's questions, the next thing we do is we excuse the
4 jury -- the panel until further call of the Court, and then we
5 do all of the challenges and excuses at the same time.

6 So the first thing we'll do is we'll talk about hardship,
7 and we'll see if we can get consensus on excusing people for
8 hardship reasons. Although, usually they try to do some time
9 screening at least for jurors up in the -- down in the jury
10 assembly room when they qualify the jury.

11 So we'll do hardships. Then we'll do for cause
12 challenges, and the Court will rule -- so the hardships will be
13 crossed off the master list. Then we'll do the for cause
14 challenges. And then we will do the peremptory. Peremptories
15 will be -- I'm treating each side as one party for purposes of
16 the peremptories. And I'm going to choose three additional
17 jurors, so there will be nine jurors here. No alternates.
18 It's a civil case. It's federal court.

19 **MR. LOEBS:** Your Honor, do you do the challenges in
20 front of the jury?

21 **THE COURT:** No. And that will become manifested in a
22 minute.

23 So we do the preliminary -- we do the peremptories. You
24 have the statutory number, as if it was one party on each side.
25 And we do it double blind. So neither side sees the other

1 peremptories as they're being selected until the very end
2 you'll be able to guess what you picked and who the other side
3 picked.

4 So the new rule that was just implemented in this court in
5 response to a Ninth Circuit ruling about passing the array and
6 all that. You don't have to worry about that here. We don't
7 pass anybody. You're just going to do your strikes, and then
8 those jurors will be crossed off the list -- those array
9 members. And then the first nine left standing will be your
10 jury.

11 So you can pretty much figure out if you have 35 or
12 40 panel members, whether you're ever going to get to the
13 people in the back. But you'll at least know what's out there.

14 And when I was trying cases, I always liked to know what I
15 was facing if I struck somebody, and you will have a pretty
16 good idea and you can work the numbers any way you want.

17 Then we'll seat the jury. We'll swear the jury, and we'll
18 go right into the trial.

19 So any questions about the jury selection? Yes,
20 Mr. Nisenbaum?

21 **MR. NISENBAUM:** How many peremptories per side?

22 **THE COURT:** What's it in -- there's --

23 **THE CLERK:** Three.

24 **THE COURT:** Three.

25 **MR. BURRIS:** The statutory is three, Your Honor, but

1 given that we have nine, I'm asking the Court, does that mean
2 we have one more?

3 **THE COURT:** That's a very good question. That's a
4 very good question. I'm going to give you one more for the
5 following reason: Normally, each side -- I'll give each side
6 one more.

7 Normally in a criminal case or where there are alternates,
8 you're required to do a separate process for the main jury and
9 the alternate jurors. But given that we're not doing that
10 here -- they're all going to be members of the jury panel --
11 I'll give each side another challenge. So that's four per
12 side. And we'll have enough panelists to take care of any
13 eventuality. So that takes care of the jury selection process.

14 Now, jury instructions. Again, in the era of busy judges
15 and sequestration and all that stuff, I have to say this: That
16 the proposed jury instructions are too lengthy and repetitive.
17 And as I stated in my standing order, the parties are
18 encouraged to keep disputed instructions to a minimum. The
19 parties have not done so here.

20 In fact, it does not appear as though the parties have
21 stipulated to any jury instructions, which I think has to be a
22 first, at least that I've been able to see. Therefore, the
23 Court is requiring the parties to meet and confer regarding
24 their proposed instructions in an effort to limit the number of
25 jury instructions requested and the number of disputed

1 instructions.

2 Now, to the extent that either party seeks an instruction
3 on federal law that is not included in the Ninth Circuit's
4 model jury instructions, the parties are admonished that they
5 need to make a showing of good cause. This Court is not the
6 Ninth Circuit. This Court does not make the law. I'm not
7 saying the Ninth Circuit does, but they have more leeway.
8 They've given us these instructions. And unless you can show
9 good cause, this Court is generally not inclined to supplement
10 the Ninth Circuit's approved instructions on federal law, based
11 on a statement from a case, without showing that the failure to
12 do so would be prejudicial.

13 If you had a Ninth Circuit case that said this instruction
14 was approved or required, that's one thing. But if in the
15 course of a ruling on a summary judgment motion or a 12(b)(6)
16 motion, the Ninth Circuit says, you know, in passing, "We think
17 this is the law" -- unless it's a jury instruction, I'm going
18 to stick with the Ninth Circuit model instruction, unless
19 there's not one covering it. But you all have tried a number
20 of these cases, and there's -- pretty much the law is well
21 stated by the Ninth Circuit. And I don't tend to comment on
22 the factual evidence.

23 So as a rule of thumb, the more you want to insert facts
24 that kind of support your theme or your theory of the case, the
25 less likely I am to give it because then it puts the Court in a

1 position of essentially approving a -- certain facts or
2 commenting on the evidence. And while I'm allowed to do it, I
3 don't ever do that.

4 So here's what I'd like to ask you, and I'll address -- I
5 was going to set a deadline for meeting and conferencing on all
6 those things and for filing revised proposed instructions and
7 supporting memoranda on the disputed instructions. But it's
8 not clear to the Court when -- whether counsel -- Defense
9 Counsel will have time to do this before he goes on leave or
10 whether the deadline should be set for a time when Mr. Loeb's
11 anticipates returning to work.

12 **MR. LOEBS:** Your Honor, I think Mr. Keith would
13 largely be -- help doing the jury instructions. I can still
14 consult with him, so I think I can do it even if I'm on leave.

15 **THE COURT:** So let's do it on the same deadline as
16 before, which would be the October date that I gave you before.

17 **MR. LOEBS:** October 21st?

18 **THE COURT:** Yes, October 21st, for the revised
19 instructions.

20 Now, next question: I wanted to -- there are a couple
21 questions that are sort of -- I wouldn't say unique to this
22 Court, but I think I would -- I'd like to think innovative, but
23 I won't -- that's for others to judge. Some might think
24 radical. It depends on whose ox is being perceived to be gored
25 here.

1 The first one has to do with the Court's proposed
2 instruction -- preliminary instruction regarding questions to
3 the witnesses from jurors and jurors discussing the case per --
4 prior to submission to them. Let's discuss what I think is the
5 easier one first, which is the questions and the Ninth
6 Circuit's proposed instruction on it.

7 Do you have any problem with that?

8 **MR. KEITH:** Your Honor, I was just about to grab it.

9 **THE COURT:** Okay. I assume Plaintiffs -- you've
10 heard that before?

11 **MR. NISENBAUM:** We're fine with it.

12 **THE COURT:** All right.

13 **THE CLERK:** Can I just ask you a question regarding
14 the jury instructions for the October 21st. Is that when
15 they're supposed to meet and confer by or --

16 **THE COURT:** Submit by then.

17 **THE CLERK:** Thank you.

18 **THE COURT:** I won't give them a date to meet and
19 confer. They can work that out. I don't know their schedules.
20 Sufficient time so that it gets done and with substantial
21 agreement.

22 **MR. KEITH:** I'm sorry, Your Honor. Which
23 instructions are we looking at right now?

24 **THE COURT:** I'm sorry? I didn't hear what you said,
25 Counsel.

1 **MR. KEITH:** I'm sorry, Your Honor. Which
2 instruction --

3 **THE COURT:** The one -- I don't know if these pages
4 are the right page numbers. The one that's called "Conduct of
5 the Jury."

6 **MR. KEITH:** Thank you.

7 **THE COURT:** And it's the --

8 **MR. KEITH:** I have it, Your Honor.

9 **THE COURT:** All right. Well, there's -- this is not
10 the one that has the ones with juror questions in it, I don't
11 believe.

12 **MR. NISENBAUM:** I think it's the second handout that
13 we were provided.

14 **THE COURT:** Yeah. Actually, that's the juror
15 certification.

16 Okay. Yes, now I have it. So it's called "Questions to
17 Witnesses by Jurors," not the "Conduct of the Jury." Sorry.

18 So do the defendants have any objection to that? It's the
19 one that allows the jurors to ask written questions after the
20 lawyers are done with the witness but before they are -- the
21 witnesses are excused.

22 **MR. KEITH:** Your Honor, the only objection I think
23 has to do with the time constraints for an already long trial,
24 that this may just end up making it even harder to try and
25 shorten it up.

1 **MR. BURRIS:** Maybe it doesn't count.

2 **THE COURT:** Pardon me?

3 **MR. BURRIS:** Maybe it doesn't count?

4 **THE COURT:** It doesn't count toward your time anyway,
5 number one.

6 Number two, in my experience -- and this is somewhat
7 surprising to me when I started doing this, they don't ask very
8 many questions. Lawyers do a really good job bringing out what
9 they need to bring out. The jurors have so much information to
10 assimilate, that they assume, usually correctly, that whatever
11 the lawyers want them to hear, they're going to hear.

12 My experience has been you get few, if any, questions.
13 And the ones you get -- usually, the procedure that I follow
14 is -- like a question during deliberation, the lawyers have an
15 opportunity to vet the question with the Court outside the
16 presence of the jury. And if they don't approve, either I
17 won't give it or I'll modify it so it meets counsel's
18 objections; otherwise, the jurors feel like they're excluded.

19 **MR. KEITH:** These are all very good reasons to do it.
20 I think the other issue -- I'm less concerned with it coming
21 out of the defendants' time or the plaintiffs' time than I am
22 with the fact that we got basically a three-week window before
23 Christmas week. So trying to squeeze a -- trying to deal with
24 that logistical difficulty.

25 **MR. BURRIS:** In my experience -- just so we're clear,

1 I haven't done it in this court before -- I agree with the
2 Court, that it really isn't time-consuming and it's quite
3 helpful.

4 **MR. NISENBAUM:** It actually cuts time out.

5 **MR. BURRIS:** It causes the lawyers to maybe refocus a
6 little bit, and I think the distinct advantages -- and it's not
7 time-consuming. At least my experience hasn't been.

8 **THE COURT:** I share the same one. And I don't do it
9 in criminal cases because usually one side or the other objects
10 to it. So we'll give you that one -- the second one is under
11 "Conduct of the Jury." I don't remember, Mr. Burris and
12 Mr. Nisenbaum, I think I must have, unless somebody objected
13 and I sustained the objection, but this is something I've been
14 doing pretty routinely in civil cases.

15 And just for the record, in the provision of "Conduct of
16 the Jury," the bolded section which talks about -- the headnote
17 is "Do not communicate with anyone in any way. Do not let
18 anyone else communicate with you in any way about the merits of
19 this case, or anything to do with it." And then the language
20 that I insert, which is also something that has arisen in the
21 context of the Ninth Circuit's jury project, is as follows:

22 Quote, This prohibition also applies to communicating with
23 your fellow jurors; however, you may discuss with fellow jurors
24 the testimony as it is presented, provided that all jurors are
25 present for the discussion. You are to keep an open mind

1 throughout the case until you have fully deliberated, unquote.

2 So what's Plaintiffs' view of that?

3 **MR. BURRIS:** We have no objections to that.

4 **MR. NISENBAUM:** Right. We did that last time.

5 **THE COURT:** Okay.

6 **MR. NISENBAUM:** It actually promotes a kind of
7 streamlining process because it facilitates the questions, and
8 that focuses things up.

9 **THE COURT:** What's the defendants' view of that?

10 **MR. LOEBS:** I think it's fine, as long as they're all
11 present and they're all participating, then I think that's --

12 **THE COURT:** Yes. In fact, I give them -- I'm sorry.

13 **MR. LOEBS:** Especially for a longer trial.

14 **THE COURT:** I actually tell them that the jury
15 room -- it needs to be in the jury room, and the door needs to
16 be closed rather than -- I don't want them deliberating around
17 the lunch table in the dining room or some bar after work
18 because that causes all kinds of problems.

19 **MR. LOEBS:** When do you find they take the time to do
20 that?

21 **THE COURT:** I would say it's based upon -- I've
22 discussed with jurors procedural issues after the fact, and
23 sometimes I submit written questionnaires just about the
24 procedures, and half of them don't ever do it. They don't
25 even -- they don't do it. The other half do it, and they find

1 it, as Mr. Burris and Mr. Nisenbaum said, very helpful because
2 if somebody says, "What did that witness say about X?" And the
3 other jurors will say, "Well, he or she said Y," or something
4 like that. And basically, they don't spend the rest of the
5 trial wondering, "Gee, what did that person say?" and never
6 getting the answer.

7 So it does make the process better because then they wind
8 up -- my guess is -- spending more time on what's really
9 important in the case rather than what color shirt was so and
10 so wearing or what did they say about where they went to their
11 undergraduate school, because they can resolve that beforehand.

12 So it's used well, and I've never heard of any abuse or
13 anything that would have been necessary to affect the outcome
14 of the trial.

15 **MR. LOEBS:** Do you ask them to come in earlier or
16 stay later?

17 **THE COURT:** No, no. Usually, what'll happen is the
18 ones that do it, I find that during their breaks, the door is
19 closed and it's quiet, and they haven't -- they're not out in
20 the hall making their cell phone calls and all that kind of
21 stuff. So, no, I don't do that.

22 As you said, it's enough of a burden being here when they
23 need to. If I said stay later or come earlier -- if they all
24 came earlier, which they sometimes do, and they wanted to
25 deliberate when all of them were present, that has happened.

1 **MR. LOEBS:** Do they elect a foreperson to facilitate
2 discussions?

3 **THE COURT:** No. They just do it informally.
4 Sometimes the foreperson emerges, but I don't really get into
5 those details with jurors because it's their province, and I
6 don't want to invade it. So that one will be given without
7 objection.

8 So moving along then, the other handout that I gave you
9 was the juror decertification, which is really nothing more
10 than, you know, we really mean it when we say don't Tweet and
11 Twitter and do all those things.

12 Do you have any objection to that, Mr. Burris?

13 **MR. BURRIS:** No, Your Honor.

14 **THE COURT:** All right. Counsel?

15 **MR. KEITH:** No, Your Honor.

16 **MR. LOEBS:** We have a particular concern in this
17 case, Your Honor, that -- for this particular instruction
18 because of the internet, and there's been a lot of press
19 related to this case, and in particular we have a concern if
20 there's any sort of discussion about this case, especially
21 those matters that have been excluded in limine between now and
22 trial, those being right in front of the jury. So --

23 **THE COURT:** So what remedy are you asking?

24 **MR. LOEBS:** We just request that the jurors be
25 admonished before they go home each day about this.

1 **THE COURT:** No, no. That's required. I will repeat
2 the conduct of the jury beforehand, and I will also give them
3 the sort of more layperson reason, that it's not just some
4 trick to prevent them from doing what they spent half their
5 life doing. That the reasons for it is that the evidence that
6 they're allowed to hear, which is, you know, based upon
7 thousands of years of Anglo-Saxon jurisprudence, is there for a
8 reason. And if they start getting stuff off the internet and
9 from other improper sources, it corrupts the entire process.
10 So if they understand why they're doing it, then I think it's
11 better than just saying, we have these rules.

12 Some judges make them turn in their phones; some judges
13 have jamming devices. But that's just like forbidden fruit;
14 the jamming devices don't follow them home, and you can't
15 confiscate their phones. So we'll discuss that, and I will
16 hammer that home many times.

17 Now, with respect to witnesses -- and some of you know
18 this already -- I prefer, in the absence of -- well, I prefer
19 that the parties call each witness one time, unless the parties
20 can show that they would be prejudiced by this procedure.

21 Now, one possible -- so therefore, for example, when a
22 plaintiff testifies, the defendant should conduct their direct
23 examination of that person -- of that plaintiff. And the Court
24 will allow the defendants to reserve their right to move for --
25 make a JMOL Rule 50 motion as a matter of law, and the Court

1 will only consider the evidence presented by the plaintiff as
2 part of its case in chief, because I find that that flows
3 better. I know strategically, you'd rather have the witness
4 testimony a certain way in a certain fashion, but I find it
5 flows better, and it avoids the -- having witness coming up and
6 down.

7 Now, if it turns out that you feel that we really need
8 this witness, it's something we may not go into, tell me and
9 I'll certainly accommodate you. This is not meant to really --
10 I generally let lawyers try their case. So -- but that's --
11 the rule of thumb is one time. They'll hear the witness one
12 time. If there needs to be rebuttal, for example, because a
13 new matter is raised by another witness, absolutely if you have
14 the time left, I will allow you to do that.

15 Speaking of which, again, with respect to the time that
16 you have listed, I came up with 29 days of trial. If I gave
17 you every minute that you all asked for with your witnesses,
18 there's no way. I haven't had a trial in ten years here on the
19 bench that was anything close to that. So here's what I'm
20 going to do:

21 Each side is going to have 35 hours to -- for direct and
22 cross-examination. I'll explain the rules on that in a minute.
23 So that only relates to witness' testimony. 35 hours. So when
24 you're up on your feet examining a witness on direct and cross,
25 or cross or redirect or recross, the time is running against

1 your 35 hours.

2 And I have to say, I think, personally, the 35 hours is
3 liberal. Meaning, it's a lot of time, especially bucking up
4 against the holidays, as Defense Counsel has mentioned. I'm
5 going to give you 30 minutes for opening statement and -- for
6 each side, which is not counted against your 35 hours. And
7 105 minutes for closing argument. One hour, three-quarters per
8 side for closing argument. So it's 105 minutes for closing
9 argument.

10 Now, let me just talk about the timekeeping procedure that
11 we'll follow here. So I sit from 8:00 to 1:30, Monday through
12 Thursday. And just so you know, depending upon the situation,
13 if matters have to be taken out outside the presence of the
14 jury, we do have a furlough one Friday a month due to
15 sequestration where we're closed for -- basically closed for
16 business, except for Chambers. But the court is closed
17 officially.

18 So the -- Congress has decided to suspend the
19 Seventh Amendment. We have to do it one day a month now for
20 each division. So we need -- we'll talk about that when we get
21 into trial, that we're not available on first Friday of each
22 month starting in May. And that's only this fiscal year. Next
23 year there may be no jury trials at all because there may be no
24 money to pay civil jurors. So if you got any pull with the
25 leadership of Congress, this would be a good time for

1 everybody's interest to help the cause of justice, but I
2 digress.

3 So we sit from 8:00 to 1:30 Monday through Thursday with
4 two 15-minute breaks. No lunch break. The jury will be
5 provided with a continental breakfast every morning, assuming
6 there's any money left. My courtroom deputy rolled her eyes.
7 Unless Congress compounds that too. But right now, you know,
8 we'll presumptively have breakfast for the jury, which
9 encourages them to get here earlier and break bread together.
10 If not, we'll figure out a way to -- I don't think we can
11 legally do what they do in state court and have you all pay for
12 it. That's not legal in federal court.

13 So I expect the jury to be fully occupied during that
14 time. And that's why I'm squeezing the -- what I call
15 "squeezing the air out of this case."

16 So counsel should be here by 7:30 each day to address any
17 matters that must take place outside the presence of the jury,
18 which would give us 30 minutes to do that, and we could always
19 take it up during breaks and also after 1:30. It's easier to
20 get a jury that way because they have a life after trial, and
21 they know they can go home at 1:30. Unless they're
22 deliberating, then I let them do whatever they want to do, as
23 long as they deliberate between 8:00 and 1:30. But if they
24 want to stay later or they want to deliberate on a Friday and
25 they unanimously agree to that, then I allow them to do that,

1 and that's what I'll tell them when the time comes.

2 Now, as you all know, my practice is to always send
3 counsel to a final settlement conference between the pretrial
4 and the trial. And I -- in this case, you will not have heard
5 all my rulings because we're having another pretrial
6 conference, which by the way, is going to take place on
7 November 4th at 2:00 p.m.

8 So I would like -- I'm going to order the parties to
9 attend a settlement conference by no later than October 15th,
10 2013. And so my question, again, to Defendants' Counsel: Will
11 Defendants be prepared to attend a settlement conference
12 without Mr. Loeb, or do the defendants request that the
13 settlement conference be scheduled when Mr. Loeb is not on
14 leave?

15 **MR. LOEB:** I think that will be fine.

16 **THE COURT:** Great.

17 **MR. LOEB:** October 15th.

18 **THE COURT:** Is that okay for you, Mr. Burris and
19 Mr. Nisenbaum?

20 **MR. NISENBAUM:** Absolutely.

21 **THE COURT:** And that will go to a -- unless you all
22 have a particular magistrate judge that you agree to, it'll go
23 to a randomly -- and he or she is available --

24 **MR. BURRIS:** Judge, I want to be clear here. I'd
25 rather have a preference for a judge than to be randomly sent

1 to a particular judge.

2 **MR. LOEBS:** Maybe we can talk and agree.

3 **THE COURT:** Why don't you discuss it. If you
4 stipulate, I'd be glad -- of course -- and again, that's the
5 last day to complete it. So that gives us a lot of flexibility
6 and time when the judge may be available.

7 So if you agree with -- for a particular judge, you might
8 want to let Chambers know, and I will call the judge and make
9 sure that he or she is available on the schedule that the Court
10 is setting. Knowing how cooperative our magistrate judges are,
11 there's no doubt that they will make themselves available
12 for -- to try to settle this case.

13 Can you tell us what generally your -- just so we don't do
14 anything that interferes with your leave, Mr. Loeb, what your
15 schedule is at this point?

16 **MR. LOEBS:** Right now, I'm planning to be back
17 October 1. So that would accommodate the two October dates. I
18 was thinking about my leave the time earlier until you gave me
19 the dates, but I'll probably be back for that on October.

20 **THE COURT:** And if it changes, let the Court know.

21 **MR. LOEBS:** Thank you.

22 **THE COURT:** And we'll be accommodating for you.

23 **THE CLERK:** Just so my minutes are clear, Your Honor,
24 counsel are going to meet and confer with regard to assignment
25 to a magistrate judge?

1 **THE COURT:** Yes.

2 **THE CLERK:** And submit it by when?

3 **THE COURT:** How about -- would two weeks be
4 sufficient?

5 **MR. LOEBS:** That's fine.

6 **MR. BURRIS:** Sure.

7 **MR. LOEBS:** Maybe just a few minutes.

8 **THE COURT:** So let's say a week then since we had
9 that "be careful what you wish for" moment. Let's say one week
10 from today.

11 **THE CLERK:** April 8th.

12 **THE COURT:** And reality is if you need to run it up
13 the flagpole, especially with the City and County, let the
14 Court know, and we'll give you some more time.

15 **MR. LOEBS:** One week is fine.

16 **THE COURT:** Before I discharge you -- because I
17 wanted to take under advisement and look at the papers with
18 respect to that one in limine motion, are there any other
19 matters, which does not include rearguing anything, that was
20 already submitted by documentation to the Court from the
21 plaintiffs' perspective?

22 **MR. NISENBAUM:** Nope.

23 **THE COURT:** From the defense perspective?

24 **MR. LOEBS:** One thing, Your Honor, and it just
25 concerns a matter I touched on briefly, and that would be any

1 pretrial statements by counsel that relate to matters that have
2 been excluded from the trial in this case. I would just like
3 there to be an order that counsel not do that, try to --
4 whether inadvertently, give statements to the press that puts
5 forward whoever might be reading the paper, maybe the day
6 before a jury selection --

7 **MR. BURRIS:** Your Honor, we don't have to be
8 admonished on anything on what the Court has given. I take
9 that as a personal insult that I have to be admonished not to
10 do something. I'm an experienced lawyer and so is Ben. It's a
11 cheap shot, and it doesn't have to be made in this courtroom.

12 **THE COURT:** You don't need to say that.

13 **MR. BURRIS:** Well, he didn't need to say that either.

14 **THE COURT:** I hear you, and the request is denied.

15 The Court has excluded evidence. The canons of ethics to
16 which all of you are expected, and I know, knowing these
17 lawyers, will comply with is not to attempt to influence a jury
18 panel. So it needn't be said, Counsel, and I don't take it as
19 a personal insult; you're representing your client, but it
20 isn't necessary. When you're in federal court, you're running
21 with the big dogs, and the big dogs will bite you if you do
22 something that's inappropriate. So for the quality of counsel
23 that we have here, that kind of thing needs not be said and
24 should not be said.

25 So anything else from the defense side, because I'm not

1 going to discharge you yet, because I want to take under
2 advisement. I want to look at your papers with respect to that
3 one in limine ruling.

4 **MR. BURRIS:** You want us to stick around?

5 **THE COURT:** Yes, please, because I want to give you
6 my ruling so you'll have all my rulings.

7 **MR. BURRIS:** Okay.

8 (Short recess was taken from 2:30 to 2:45 p.m.)

9 **THE COURT:** We're back on the record.

10 What I think I'm going to do is I think I'm going to give
11 this a little bit more deliberation, and I'm going to take the
12 defendants up on their offer. I would like to get a list of
13 the alleged incidents by family members. And I'll give you the
14 deadlines for doing that.

15 What I'd like to get is specifically what the act is and
16 what the evidence would be in support of that. In other words,
17 just a more -- so in other words, it might be, "Well, X is
18 going to testify about Y," or "There's going to be a medical
19 record," but I want an offer of proof with respect to that
20 rather than a proffer so I can know what I'm excluding or
21 including.

22 And then I'd like no more than one paragraph for each
23 piece of evidence, telling me precisely to what issue the
24 evidence is relevant. So it would be -- let's say it would be,
25 you know, just make it up -- well, I'm not making it up from

1 the papers. So somebody attempted suicide. So what is the
2 evidence that proves that because then I can determine
3 whether -- you say it happened, but there's no concrete
4 evidence that it happened.

5 And precisely to what issue is it relevant and what is
6 your authority for its -- if you're the party seeking to get it
7 in. Because I need to be -- there's a lot of issues as to
8 which this may be relevant. And at the end of the day, I may
9 decide that under Rule 403, that it is -- you know, not clearly
10 more probative than prejudicial and exclude it anyway or allow
11 it in a more, shall we say, sanitized version. So I want that
12 by April the 8th.

13 So again, it's the evidence and one paragraph -- no more
14 than one paragraph support -- so you tell me it's relevant to
15 the issue of X, and here's the authority for its admissibility.
16 I don't need extensive argument, especially if it's already in
17 your in limine papers. And I'd like Plaintiffs' response by
18 the 15th. And I will then issue a written ruling. I won't
19 have to drag you folks back here again for that.

20 Now, let me ask if it's possible to -- Counsel, I was
21 thinking about and contemplating what we were talking about
22 before, especially given that I've ordered you to a settlement
23 conference, in requiring that the jury instructions come a lot
24 earlier, because I think it would be good for all of you to
25 know what the Court's jury instructions are going to be. That

1 way to the extent there are disputes, the Court will have time
2 to reflect on those and then at the next calling of the case,
3 maybe if I need more argument, I can order that.

4 So I was -- I wanted to give you a much more aggressive
5 deadline of April the 15th to meet and confer and get me your
6 revised jury instructions, which hopefully -- again, I've given
7 you some pretty good guidance, which is to the extent it's
8 something covered by any Ninth Circuit pattern instruction,
9 that's going to be it.

10 But I would expect you all to sit down and meet and
11 confer, and you may think, "Hey, this may be" -- "this
12 particular instruction may be really helpful," but what I'm
13 trying to do is avoid reversible error and do what's fair to
14 the parties, so I don't want facts. I want law, and I want
15 that -- I want that by April 15th. If that slips, you know,
16 and you have good reason, I can push you back.

17 Mr. Burris?

18 **MR. BURRIS:** I was going to say just as a cautionary
19 note -- at least as a basis, the Court is disinclined to have
20 jury instructions that focuses up individual facts --

21 **THE COURT:** Correct.

22 **MR. BURRIS:** -- as a -- if you find issue, then da da
23 da?

24 **THE COURT:** Right, because that puts me in the
25 position of really commenting on the facts. And it also

1 requires me to really expand -- and on the other side -- you
2 know, but if you find this, it becomes more like me giving a
3 closing argument. It becomes more like asking for
4 interrogatories of the jury, and I'd rather let you -- you
5 folks are good lawyers. You can argue all that, and we can
6 deal with it then. If we have to deal with it in the special
7 verdict form, we'll deal with it there. But I don't generally
8 like those in the instruction, unless the parties agree to it.

9 For example, you've agreed upon a statement of the case or
10 you will have agreed on the statement of a case and that's
11 agreed upon and that's neutral, then, of course, anything you
12 all agree to, if it's reasonable, I'll accept it. So those
13 would be the new deadlines.

14 Again, if you -- if for some reason you can't meet the
15 15th, let me know and do a stipulation and order. But I'd like
16 to get it reasonably close to then so I have a lot of time to
17 reflect, and you all will know by the time you start with your
18 magistrate judge in the settlement process, what the jury
19 instructions are going to look like, and what you are going to
20 be facing at trial.

21 **MR. BURRIS:** Yeah, we've agreed, Your Honor, upon
22 Magistrate Judge Spero as the potential settlement judge --
23 settlement person.

24 **THE COURT:** Is that correct?

25 **MR. LOEBS:** Yes.

1 **THE COURT:** Well, I will call him and tell him the
2 schedule and -- in advance of issuing the formal referral, just
3 as a courtesy, and make sure -- it's easy for us to sit up here
4 and bind our hard-working magistrate judges, but I don't like
5 to do that without checking with him. But he's a team player,
6 and he'll help us out.

7 Anything else from the plaintiffs' perspective?

8 **MR. NISENBAUM:** Just with respect to the format of
9 how you want the revised jury instructions. As you know, we
10 submitted it in a certain way and then we each had our memos
11 for and against.

12 **THE COURT:** What I would love to see is a -- my
13 fantasy is one set of agreed-upon instructions. My reality is
14 a whole bunch of agreed-upon ones or withdrawn ones and then
15 ones that continue to be in dispute.

16 But again, with due regard with what I was discussing with
17 Mr. Burris, nonfactual and as tight -- as close as possible.
18 If the Ninth Circuit has preempted the field, if they said
19 anything on the subject, in my view, they preempted the field.

20 **MR. NISENBAUM:** Got it. That's actually very
21 helpful.

22 **THE COURT:** Anything else?

23 **MR. LOEBS:** Yes. We had a request for some special
24 interrogatories for the jury. Is that something we take up at
25 the next pretrial?

1 **THE COURT:** If you're going to do that, at least meet
2 and confer, narrow your differences and --

3 **MR. LOEBS:** Discussion.

4 **THE COURT:** -- and submit that by April 15th.

5 **MR. NISENBAUM:** I think we've already gone through
6 that process.

7 **THE COURT:** You have? Okay. Well, if that's the
8 best you can do, I'll look at those and I'll rule on them as
9 they are. But you're going to be meeting anyway. Maybe
10 someone will see some sense in the other side's position. Hope
11 springs eternal.

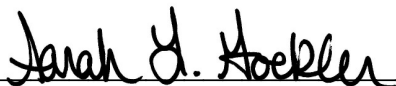
12 **MR. NISENBAUM:** Always, always.

13 **THE COURT:** Thank you very much, gentlemen. I
14 appreciate the hard work.

15 (Proceedings concluded at 2:52 p.m.)

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17 I certify that the foregoing is a correct transcript from the
18 record of proceedings in the above-entitled matter.

19
20 

April 24, 2013

21 Signature of Court Reporter/Transcriber Date
22 Sarah L. Goekler
23
24
25